IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. CHRISTOPHER MATTHEW TAYLOR, Petitioner.	)	2 CA-CR 2006-0308-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. CR2005-110

Honorable R. Douglas Holt, Judge

REVIEW GRANTED; RELIEF DENIED

Law Office of Robert Louis Murray
By Robert L. Murray
Tucson
Attorney for Petitioner

V Á S Q U E Z, Judge.

¶1 Pursuant to a plea agreement, petitioner Christopher Taylor was convicted of two counts of attempted sexual conduct with a minor, both class three felonies and dangerous crimes against children. The court sentenced Taylor to a presumptive, ten-year prison term on one count, to be followed by a five-year term of probation on the other

count. The court also required Taylor to register as a sex offender for life. Taylor then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., challenging the ten-year sentence. The court dismissed his claim, and this petition for review followed. We will not disturb a trial court's ruling on a post-conviction petition unless an abuse of discretion affirmatively appears. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶2 At sentencing, the court found the absence of a criminal history was a mitigating factor and the "damage" to the victim was an aggravating factor. Taylor argues that the sentencing court did not fully consider the mitigating factors presented, most importantly, that he was only fifteen years old when he began committing acts of oral sex and digital penetration on his cousin, who was ten years old when the acts began. "A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). We will find an abuse of sentencing discretion only if the court acted arbitrarily and capriciously or failed to adequately investigate the facts relevant to sentencing. *State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001).

¶3 Taylor argued in his Rule 32 petition that the court's consideration of the harm the victim had suffered was not an appropriate aggravating factor and that the court had failed to consider various mitigating factors in addition to his youth, such as his remorse,

the absence of a criminal record, his dysfunctional upbringing, and his compliance with the terms of his pretrial release. However, his sole argument on review is that the sentencing court failed to exercise any sentencing discretion because it failed to investigate the "overwhelming weight of mitigating factors" relevant to sentencing.

¶4 The trial court noted in its ruling dismissing Taylor's Rule 32 petition that it "did not have to consider any aggravators or mitigators and could have imposed a presumptive sentence of 10 years without any discussion whatsoever of aggravators or mitigators," also noting that it was not bound to consider Taylor's age as a mitigating factor. Although the trial court correctly stated that the imposition of a presumptive sentence does not require a court to discuss aggravating and mitigating factors,[1] it arguably misstated that it was not required to consider the factors presented, something it obviously had done, in any event. *See State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004) (although a sentencing court must consider evidence offered in mitigation, it is not required to find the evidence mitigating).

[1]Section 13-702(B), A.R.S., only requires a sentencing court to state "on the record at the time of sentencing" the reasons for imposing a sentence other than the presumptive term. *See State v. Harrison*, 195 Ariz. 1, ¶ 11, 985 P.2d 486, 489 (1999). Here, because the sentencing court also stated on the record the aggravating and mitigating circumstances it had considered, something it was not required to do, Taylor was arguably entitled to a determination whether the court's consideration of those factors was proper. However, because Taylor does not challenge on review the appropriateness of the factors at sentencing, we need not address this issue.

¶5 At sentencing, the trial court heard defense counsel's argument in favor of mitigation, as well as testimony from Taylor's uncle and the uncle's former wife, both of whom discussed Taylor's positive qualities and stated that he was welcome to live with them. After considering this testimony, the court concluded it was unwilling to assume the "risk [of Taylor's residing with his aunt or uncle] for the foreseeable future in this community," particularly in light of information regarding Taylor's truthfulness and possible sexual attraction to "little girls" contained in the "psychosexual" evaluation report before the court. In addition, the victim's father had asked the court to consider that his daughter "had something stolen from her that had no right to be stolen," her fear that she will run into Taylor, the nightmares she had suffered since the incidents with Taylor, and her "absolute dread" of going anywhere without her parents. The sentencing court clearly considered the aggravating and mitigating factors presented and then determined the weight to be accorded that evidence, an act within its discretion. *See State v. Walton*, 133 Ariz. 282, 296, 650 P.2d 1264, 1278 (App. 1982).

¶6 Moreover, having had the opportunity to reconsider its sentencing decision in the post-conviction context, the sentencing court nonetheless ratified the sentence it had imposed. In its ruling dismissing post-conviction relief, the court discussed the mitigating factors Taylor contends it had failed to consider and reaffirmed that it was "not persuaded that it committed error by ignoring as mitigating factors, the factors suggested by the Defendant in his Rule 32 Petition." The court noted that it had considered the lack of

criminal history to be a mitigating factor. We thus conclude the court adequately investigated the factors relevant to sentencing before imposing sentence, as it was required to do. *See Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d at 1160. Simply because Taylor does not agree with the court's evaluation of those factors does not mean the court abused its sentencing discretion.

¶7 In addition, Taylor complains that the court's explanation at sentencing of the consequences of future probation violations was unclear. However, he does not contend that he does not now or did not at the time of sentencing understand these terms or that he was prejudiced by the court's explanation, nor has he explained the relevance of this claim to his argument on review that the court abused its discretion by failing to consider all relevant mitigating factors at sentencing. Similarly, Taylor complains that the court's having referred to Taylor's "anal penetration" of the victim in its Rule 32 minute entry ruling was improper in the absence of evidence that such an act occurred. Counsel had challenged the court's use of this language at sentencing, to which the judge had responded:

> I guess I got [the reference to anal penetration] from the victim's [impact] statement, who indicated it was anal penetration and that she had hemorrhoids as a result.
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> . . . .
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> . . . For the record then, be it vaginal or anal, to me it's the same. . . . It results in the same damage to this little girl. . . . If it's vaginal penetration so be it. The result is the same. And I'm not going to change the presumptive 10 years.

Why the trial court chose to use language regarding "anal" penetration in its minute entry is unclear, but what is clear from the entire record is that whether or not Taylor committed anal or vaginal penetration on the victim had no bearing on the court's decision to impose the sentence it did.

¶8 Because we cannot say the sentencing court abused its discretion by denying post-conviction relief, we grant the petition for review but deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge